UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Brian J. Martin, et al.,

Plaintiffs,

Case No. 15-12838

-v-

Trott Law P.C., et al.,

Defendants.
_____/

MOTIONS TO DISMISS
MOTION TO AMEND

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
March 3, 2016

APPEARANCES:

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2:59 p.m.

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THE CLERK: All rise. The United States District Court for the Eastern District of Michigan is now in session. The Honorable David M. Lawson presiding.

THE COURT: You may be seated.

THE CLERK: Now calling the case of Martin versus Trott Law, Case Number 15-12838.

THE COURT: Good afternoon, counsel. Would you put your appearances on the record, please?

MR. McGUINNESS: Andrew McGuinness -- sorry, your Honor.

Andrew McGuiness for the plaintiffs.

MS. GJONAJ: Diana Gjonaj for the plaintiffs.

THE COURT: Pronounce your last name, please.

MS. GJONAJ: Gjonaj.

THE COURT: Thank you.

MS. OLSON: Good afternoon, your Honor. Charity Olson appearing on behalf of Trott Law, P.C.

MR. AVIV: Good afternoon, your Honor. Joseph Aviv of Honigman Miller Schwartz & Cohn on behalf of defendant, Congressman David A. Trott.

MR. SEGAL: And, your Honor, Bruce Segal, also

appearing on behalf of Congressman Trott, also with the Honigman law firm.

THE COURT: His mother named him "Congressman"?

MR. SEGAL: No, your Honor.

THE COURT: All right. The matter is before the Court on motions to dismiss.

The law firm filed a motion to dismiss. The individual filed a motion to dismiss. And then the plaintiff also filed a motion for leave to file a second amended complaint.

I have read through your submissions. I'm familiar with the facts. And so when you present your argument, please keep that in mind.

Who wants to go first, the law firm or the individual?

MS. OLSON: I will, your Honor.

THE COURT: Ms. Olson on behalf of Trott Law.

MS. OLSON: Yes, your Honor.

THE COURT: You may proceed.

I would like to limit these submissions to about ten minutes each.

MS. OLSON: Certainly, your Honor.

And I will do my best not to belabor points. I know the Court takes the submissions seriously, and I'm certainly open to any questions that may be looming in light of the

review of the submissions.

Otherwise, just to walk through, our position is very simple. We don't believe that assuming the allegations to be true, as this Court must on a 12(b)(6) motion, that plaintiffs have stated viable claims under either of the three current theories that are pending.

We call them the attorney letterhead claims, the attorney -- or amount of debt claims, and then the third claim, which is the overshadowing series of claims.

The attorney letterhead claims, we have argued and --

(Cell phone interruption at 3:02 p.m.)

THE COURT: People have been jailed for less than that, Mr. McGuinness.

MS. OLSON: If I may, your Honor.

THE COURT: No, just one minute. Let's make sure we don't get interrupted again.

(Pause in the proceedings at 3:02 p.m.)

THE COURT: Is it off?

MR. McGUINNESS: It's completely off, Judge. I'm sorry.

THE COURT: Okay. Go ahead.

MS. OLSON: Plaintiffs argue that the letters that were attached to the first amended complaint suggest, either in a way that's false or misleading to the recipient of the letter, that an attorney has been involved in the sending of

the letter when, in fact, no attorney has been involved.

We know what the standard is in the Sixth Circuit, Judge. You're well aware of it. You have written extensively on it in opinions that you have offered, not only in relation to claims against Trott Law, but other defendants in FDCPA claims.

The fact of the matter is, the Sixth Circuit very clearly sets forth that if a communication is reasonably susceptible to two different interpretations, one of which is inaccurate, that can state a claim for a false and misleading communication in violation of the Act.

As we look at these letters, though, we don't look at them in a vacuum, your Honor. We look at these letters and we say, what is false, what is misleading, what is susceptible to a misinterpretation as it relates to this particular letter. Either an attorney sent it or an attorney didn't send it.

The problem, of course, is by virtue of plaintiff's own complaint, which relies extensively on testimony that was taken in a totally unrelated matter, plaintiff is essentially relying on testimony that indicates that an attorney is involved in reviewing the file, examining the file, examining the information that's coming from the client before a letter such as the letters that have been attached goes out.

So the suggestion that an attorney isn't involved is not only inaccurate, it's belied by the own -- by the very

testimony that plaintiffs are seeking to rely upon to get past the 12(b)(6) hurdle. The fact that --

THE COURT: Well, you know, I think there are -- there might be sort of parallel arguments here that I would presume Mr. McGuinness would want not confounded.

One is that there is an involvement of an attorney by virtue of the fact that the individual, Mr. Trott, had some supervisory authority and was the principal in the firm, and then there is the question about whether these individual letters, on an item-by-item basis, were reviewed by an attorney as opposed to administrative personnel in the firm.

I think those -- if you're saying that there is some inconsistency there, then why don't you elaborate on that, but if that's not your argument, then set me right.

MS. OLSON: It's not. And I am going to leave the issue of Congressman Trott's involvement to my colleagues.

My issue pertains to what essentially plaintiff has done to attempt to plead in the alternative. Either the letters, on the one hand, were not sent by an attorney, but the least sophisticated consumer would open up the letter and say, ah, an attorney sent this, and it would create this false sense of urgency, this fear that there is this imminent action, this parade of horribles is about to unfold.

In the alternative, plaintiff argues, well, it was sent by an attorney, but by virtue of the fact that an

attorney's name isn't on the signature line, an attorney's signature isn't on the signature line, somehow we have misled the consumer to open and be misled as to -- as to the fact that a clerical person or some non-attorney personnel in the firm sent the letter.

The problem I have with this argument is, if the letter is being sent by somebody in a firm, after it's been reviewed by an attorney at the time of placement to determine whether or not title is proper, whether or not all of the other requirements have been met in order to proceed with foreclosure, how does the fact that an attorney has either physically signed the letter or not transform an otherwise accurate letter into a violation of the FDCPA?

All of the case law in this -- in this area deals with circumstances in which a court has concluded there is a false sense of urgency. Because you have essentially an attorney who's lent his or her name to a letter in order to up the ante, right, to get the debtor's knees knocking, as some courts have said.

The reality is, in this circumstance, not even plaintiff concedes that there was some, you know, false sense of anything portrayed by virtue of informing the recipient, hey, your mortgage is -- your mortgage is in default, it's been referred for foreclosure. This is what we do.

This isn't a situation, you look at the Clomon case

that we cited, you look at the Avila case that we cited, these are the lead cases in this area of the law that have been cited hundreds and hundreds of times by courts around the country, and all of these decisions have looked at whether or not there is a suggestion that an attorney is involved in a process when the reality, is he or she is not, in fact. It's an illusion, it's a ruse.

But not even plaintiff has argued that by sending this letter Trott intended to trick the consumer into thinking their file had been forwarded for foreclosure when it had not, in fact, been.

In fact, when you look at some of the other claims --

THE COURT: You're saying the reason the letters were sent was the very reason that it was referred for foreclosure.

MS. OLSON: Right. And so it's not analogous to these other cases in which you have a collection agency sending a letter on a $10 debt or a $50 debt on an attorney letterhead when they have no intention, they are not contemplating further activity. There is no professional judgment being exercised.

So the circumstances surrounding this very letter are not only distinguishable based on the cases that have been cited, but essentially plaintiffs concede, whether they do so expressly or impliedly, that this is being sent over, that there are attorneys involved, that they are exercising

professional judgment.

So on that basis, the suggestion that this letter can be read one of two ways, and as long as one of them is potentially inaccurate, we have a cause of action. Unfortunately, based on the facts, based on the pleadings, based on the testimony -- and this is testimony that plaintiffs interjected. This is not something that we have tried to bring in improperly in order to support our motions. This is the testimony: The testimony is that the attorneys are involved in the files. The testimony is, these letters are sent.

The suggestion that the only way to avoid this claim would have been for Trott Law to include a disclaimer in the letter saying no attorney's involved, that would be false, that would be misleading. So again, I just think these facts are distinguishable from other attorney-letterhead claims that we have seen.

As it relates to the second claim, your Honor, and this is the claim that -- and again, this claim is pled in the alternative, I presume in an effort to get around a 12(b)(6) motion, essentially saying either you didn't add fees in the amounts that you set forth or you did add fees and they were overstated.

The problem is, again, when you take the legal theory away and you look at the facts, the underpinning of that

particular claim, there's no facts in the record, there's no facts in the pleading for the Court to even take as true on its face to know whether or not these people owed fees, to know whether or not fees were included.

So as much as plaintiffs want to suggest that, you know, we can plead in the alternative and either way gets us over this hurdle, at the end of the day, there is no factual underpinning for the claim. And that is essentially the focus of Twombly as we know it.

The last claim, the overshadowing claim, again, pled in the alternative is, look, you know, we have put the 1692g validation language in there. There is no disagreement, I believe, amongst the parties that the language is technically accurate.

Plaintiffs, in response to our motion, your Honor, they argued, you know, counsel for Trott Law has it wrong, because even if it's technically accurate, if it's confusing, if it overshadows, it states a cause of action. I absolutely agree, that's what the case law says. I'm not suggesting that technical accuracy is some sort of shield for an FDCPA claim.

But what I am saying is this: You look at the Lamar case, the Lamar case dealt with conflicting deadlines, the possibility of conflicting deadlines. And the Sixth Circuit said, hey, while you can't confuse consumers, you are not under an affirmative duty to begin to sort of lay out and

explain these conflicting deadlines in the way that's been suggested by plaintiff in this particular case, your Honor.

The Lamar Court, in a case involving a sort of parallel lawsuit that had been filed with a shorter response period, the Court looked at it and said, fairly emphatically, that the FDCPA, notwithstanding its broad sort of consumer protection mandate, would not require a debt collector to otherwise get in the business, essentially, of rendering legal advice and putting in some sort of reconciling language in order to explain.

At the end of the day, the 30-day disclosures are there for the least sophisticated consumer to pick up the phone, write the letter, do any of the things that the statute presumes.

The fact, again, that the matter has been sent to the firm for foreclosure proceedings in the absence of a firm date for a sheriff's sale, again, your Honor, it doesn't, at the end of the day, confuse the least sophisticated consumer as to what he or she needs to do to exercise those rights in the 30-day period.

So at the end of the day, we don't feel that a claim has been stated as to either, or as to any of the three claims, and we would ask that the Court grant our motion to dismiss for the reasons briefed.

THE COURT: You're also standing on the statute of

limitations argument with respect to plaintiff Martin, is that correct?

MS. OLSON: Yes, that's correct. Certainly as it relates to the federal claims, your Honor.

THE COURT: All right. And then I'll give you a chance to address the amendment motion after the plaintiffs have a chance to discuss that, and you can raise that when you also present your rebuttal argument.

MS. OLSON: Thank you, your Honor.

THE COURT: All right. Thank you, Ms. Olson.

Mr. Segal, Mr. Aviv, which one of you is arguing?

MR. AVIV: I will, your Honor.

THE COURT: Very well. Mr. Aviv, go ahead.

MR. AVIV: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. AVIV: May it please the Court, we adopt Ms. Olson's arguments. And if you accept Ms. Olson's arguments, then, of course, the case against Congressman Trott falls, as well.

THE COURT: You know, Mr. Aviv, I have great respect for our Article I officials; this case is not against a congressman.

MR. AVIV: I understand that, Judge.

THE COURT: Mr. Trott was not a congressman at the time these actions arise, and I think it would not be useful

in this case to use that appellation here, even understanding his new status, following the events of this case.

MR. AVIV: And I shan't. Actually, it came out of my mouth without my thinking about it.

THE COURT: I know. That happens from time to time, and I don't mean to criticize you personally for that. I'm just suggesting a way to approach it.

MR. AVIV: Yes.

And so what I'm suggesting is that if you accept Ms. Olson's arguments, then the case against Mr. Trott falls, as well.

THE COURT: Yes, I agree.

MR. AVIV: But we have additional arguments. And it's going to take me a bit more time to develop them, your Honor, because this is the very first time -- there has been, gosh, a dozen cases against Trott Law, but this is the first and only time that the individual shareholder, Mr. Trott, has been sued. So I think it's important to understand the issues and come forward with a strong ruling here.

So the specific -- the only material facts alleged against Mr. Trott in the first amended complaint is that he was a shareholder of Trott & Trot,t P.C. He was a shareholder until 2014. At that time he left the firm and the name of the firm changed.

The firm had -- during the time that he was there, it

is alleged that the firm had 61 to 73 attorneys, depending which paragraph of the complaint you look at. And the State corporate information updates that your Honor can take judicial notice of, they are official papers filed with the State, shows that throughout the proposed class period Trott, P.C. had between five and seven shareholders.

And in 2012, the year that the Martin letter was sent, in 2012 Trott, P.C. had three directors, and by that time Mr. Trott was no longer the president of the corporation, and was no longer an officer of the corporation.

Now, plaintiff Martin's claims are based on a letter sent on May 3, 2012, more than three years before the complaint was filed; and plaintiff Nundley's letter was sent in August 2014, two years after Mr. Trott was no longer an officer of the corporation. The one letter was attached as Exhibit A, the other letter is attached as Exhibit B. And the only violations of the FDCPA and the RCPA alleged in the complaint are the sending of these two letters attached as Exhibits A and B.

So we start with the -- with the statute, Section 813(a) of the federal -- of the FDCPA, the civil liabilities section. And it imposes liability on any debt collector who fails to comply with any provision of this title with respect to any person.

So to state a claim, the plaintiffs must establish

two different prongs, two different requirements: Both that Mr. Trott was a debt collector and that he violated the Act with respect to these plaintiffs. Each prong must be satisfied.

And I think in the first amended complaint and in the response in opposition, the plaintiffs seem to fuse these two requirements into one. They are two separate requirements.

And regarding the debt collection requirement in the statute, your Honor, what must be shown is that Mr. Trott is actually a debt collector, not an indirect debt collector, as plaintiffs seemed to argue.

If you look at the statute in the definitions section, 803, the term, debt collector, is not defined as a person directly or indirectly engaged in the business of collecting debts. The direct or indirect language doesn't modify the noun, person.

THE COURT: You mean it is defined. You said it was not defined.

MR. AVIV: What I said, the term, debt collector, is not defined as a person directly on indirectly engaged in the business of collecting debts, not defined. The term, directly or indirectly, doesn't modify the noun, person; it modifies the verb, collect.

What the statute says is, debt collector means any person who collects or attempts to collect, directly or

indirectly, debts owed to another.

THE COURT: Right. I don't think there is any dispute about how that statute ought to be read.

MR. AVIV: So, for example --

THE COURT: Adverbs modify verbs.

MR. AVIV: Right. So, for example, a lawyer who sends a letter that says Bank of America is owed money can't say that he is not collecting a debt, because the statutory use of the word, indirectly, modifies the verb, collect.

THE COURT: How do you -- how do you deal with the allegations in paragraph 152?

MR. AVIV: Well, those allegations are entirely conclusory, and they are exactly the type of allegations that were held by the Supreme Court in Iqbal to be disentitled to any assumption of truth.

I mean, the allegation is that -- is that Mr. Trott had supervisory control or authority over the business practices of Trott, P.C. because of his position as managing member, managing president and/or CEO, this whole list of titles with an and/or tying that to --

THE COURT: Well, actually, it says more than that. It says, "On information and belief, David Trott was personally involved in creating, reviewing and approving the form foreclosure letters --" and I'm paraphrasing this part -- involved in the complaint, and in the adoption or

implementation of the procedures by which those form letters were sent to the named plaintiffs and class members.

I don't see how that is a conclusory allegation. It makes an allegation of fact.

MR. AVIV: How is he involved?

THE COURT: I mean, maybe it's not true, but --

MR. AVIV: But how was he involved? What did he do? There is no allegation that he drafted these letters. There is no allegation that he drafted -- that he sent the letters to the plaintiff. The allegation is that he is involved in the business practices that create this form letter, but there is no allegation as to how he was involved.

And in Iqbal, what you had is you had an allegation that the Attorney General was the principal architect. You had the allegation that the FBI Director was personally involved in creating the discriminatory policy that was challenged there. Personally involved, that -- that's the allegation in Iqbal.

And the Court said, that's not a factual allegation, that's a conclusion. How was he personally involved?

And so, so what they really rely on is the Kistner case. I mean, that's -- that's really their entire -- their entire case, the Kistner case.

And let's talk about the Kistner case for a second. What Kistner did was, it analyzed the first prong of the

statute, the debt collector prong.

And before I get to Kistner, because I do want to make this point, your Honor, there is no -- there is no indirect control person liability under the statute. If you control the debt collector, that doesn't make you a debt collector.

For example, I just argued a case involving the Delaware Securities Act, and the Act says that any person who makes a statement of material fact -- I'm sorry -- any purchaser, seller or offerer who makes a statement that is false, materially false, is liable. And then it imposes liability on every person who directly or indirectly controls the buyer or the seller. Directly or indirectly controls. Federal Securities Act, same thing.

There is no control person liability in the FDCPA, which is exactly what they are alleging, that he controls everything. And if Congress knew how to put that liability in the Securities Act, it certainly knew how to put that liability in the FDCPA.

So we get to Kistner and what -- Kistner, again, dealt with the first prong, debt collector. And it was an issue that came to the Sixth Circuit after the grant of summary judgment for Mr. Margelefsky by the United States District Court for the Northern District of Ohio. And the Sixth Circuit criticized the District Court because the

District Court had not analyzed what makes a debt collector. And the Sixth Circuit said, that's a question of law. A question of law. And because it's a question of law, they did not remand it back to the District Court, they decided that question of law in the Sixth Circuit, what is a debt collector.

And in that case -- and of course, the Sixth Circuit did not follow the opinion of the erudite Richard Posner of the Seventh Circuit, who had held that you can't sue the shareholder of a corporate debt collector without piercing the corporate veil.

I mean, Judge Posner was so upset about that case that he said it was, in effect, malicious prosecution and the plaintiff should have been sanctioned for suing the individual shareholder. But that's Seventh Circuit law.

The Sixth Circuit, in its wisdom, did not follow Judge Posner, and what it held is, it followed the District Court decisions in the various districts of the circuit.

And if I can give you the exact language, because I think it's important --

THE COURT: From Kistner?

MR. AVIV: From Kistner.

THE COURT: It says, he may be personally liable on the basis of his participation in the debt collection activities of the firm more generally; is that the language

you're referring to?

MR. AVIV: Says, where a shareholder, officer or employee of a corporation is personally involved in the debt collection at issue, personally involved, he may be held personally liable as a debt collector without piercing the corporate veil.

Personally involved, not indirectly involved. So you look at the specific findings that the Kistner Court made.

Number one, Margelefsky personally drafted the form letter that was then sent to the plaintiff.

Number two, he was one of only two attorneys at the firm.

Number three, he was the only member of the LLC.

Number four, he personally oversaw compliance with applicable collection laws and he personally got involved when the intervention by a lawyer became necessary.

THE COURT: And we know all of this because the case came to the Sixth Circuit on summary judgment after discovery occurred, isn't that correct?

MR. AVIV: Yes, it did. But as I said before, the Court was determining the issue as a matter of law, as a question of law.

THE COURT: No, I understand that, Mr. Aviv. And I understand the distinction you are trying to draw. But you are citing factors that the Court considered -- or at least

you think I ought to consider -- in making that application of fact to law that were developed in the record. And we're a step or two ahead of that -- or behind that, I should say, in this case on a 12(b)(6) motion, right?

MR. AVIV: Well, I of course concede that those facts were developed as a result of admissions made by Margelefsky at a deposition, that is correct. But what they demonstrate is the kind of facts that need to be alleged in a complaint in order to survive, as a question of law, the issue of whether the defendant is a debt collector. That's a question of law.

And -- and all I'm asking you to do is look at the complaint and just at the complaint, don't look at the conclusions, because they are not entitled to any presumption of truth. Look at the facts alleged.

So what are the facts alleged? Unlike in Kistner, in this case, there is no allegation -- there is no allegation in the complaint that Trott had any role in drafting the letters that were sent to the plaintiffs, or that he had any involvement in the collection of plaintiffs' debts, or that he was personally engaged in the collection of debts in general. No such allegation.

Unlike in Kistner, there is -- he was not -- he is not one of two attorneys in a law firm, he is one of between 61 and 73 attorneys.

Unlike in Kistner, he was not the sole member of a

limited liability company or the sole shareholder of Trott, P.C.

From the beginning of the proposed class period until the time he left the firm, the firm had between five and seven shareholders. It's not a sole shareholder firm.

Unlike in Kistner, there is no allegation that he was personally involved in overseeing compliance under applicable collection laws. There is no allegation like that.

Unlike in Kistner, there is no allegation that Congressman Trott was personally involved in any debt collection when the intervention by a lawyer became necessary. He never acted as a lawyer.

THE COURT: Mr. Aviv, I --

MR. AVIV: There is no allegation --

THE COURT: Excuse me, Mr. Aviv. I understand your argument and you're over your time. Would you like to sum up, please?

MR. AVIV: Your Honor, I think the complaint should be dismissed and I think judgment should be entered forthwith. There is no just reason to delay. Thank you.

THE COURT: All right. If you win and your client is dismissed, I may ask you for additional briefing on that Rule 54 issue.

MR. AVIV: Thank you, your Honor.

THE COURT: Thank you.

Mr. McGuinness.

MR. McGUINNESS: Good afternoon, your Honor. I'll try to be brief.

Let me address a couple of what I think are overarching problems with both these arguments. They pay lip service to three propositions, but they really ignore them.

On a 12(b)(6) you have to construe the pleadings in favor of the plaintiff.

Ms. Olson wants to interpret --

THE COURT: Well, that's not the Iqbal rule.

MR. McGUINNESS: The factual allegations.

THE COURT: Sure.

MR. McGUINNESS: But still, in terms of one of the key factual issues in the case, whether or not these letters are misleading, I mean, that's going to be a determination -- unless we persuade you in our favor on summary judgment or they persuade you in their favor on summary judgment otherwise -- for the jury to resolve.

And viewed that way, the issue isn't whether Ms. Olson thinks the letters are clear, to her point, it's whether or not they are capable of the opposite interpretation, interpreted in favor of the plaintiffs, as is required. And we cited those cases. It's a well-known proposition. The allegations have to be accepted as true.

You have cited 152. I want to reserve talking about

the individual liability of the individual defendant before I go through the broader argument for dismissing the whole complaint.

But there are numerous allegations of Mr. Trott's involvement, but just limiting it right now to the overarching issue of attorney's fees, we -- I have cited to you in our response the numerous paragraphs of the complaint where we say that those fees were owed, 106, 111 to 12. I don't want to repeat all these paragraphs here, but -- and we have cited, we have gone beyond that, Judge.

THE COURT: How can -- how can a letter be misleading when it alleges or where it tells the debtor that the debtor owes less than he actually does?

MR. McGUINNESS: Well, take a look at the Kevelighan case that we brought in very narrowly just some select parts of that.

On day one, here's the amount owed. They interpret -- I think misinterpret -- some requests for validation as a request for a reinstatement quote, and within a couple of weeks the attorney's fees have multiplied enormously.

So on that basis, we initially pled that they were not following the McCalla decision -- which has been cited by them many, many times, by the law firm, for propositions that they like -- for the proposition that they have to state the amount of the debt. They weren't forgiving that amount of

debt.

We have provided you and made allegations, specific factual allegations which are true that these are foreign mortgages. They have to be approved by HUD or FNMA or all the other organizations. They all provide for attorney's fees in the event of a foreclosure.

I'm quite confident that the Trott Law firm, which has described itself as a foreclosure firm and the primary foreclosure firm in the state for many decades, doesn't do foreclosures for free, Judge. So it's just not the case that those fees were somehow waived.

But even if that were true, and even if you concluded that they didn't have to then put that amount owed under the contract, under the mortgage in the amount of the debt, even though that's what we believe the FDCPA requires, and the RCPA, you have the situation of the Wilson case where, based on the testimony, sworn testimony -- because you gave Mr. Parker a 30(b)(6) in that case, and I'm happy you did, because when I finally got my hands on the transcript, I didn't realize it had been filed in that case as a public record -- just on that transcript they added $500 under that corporate advance term.

And -- and I'm now flipping into the -- slightly into the individual allegation. We pled -- I shared with Mr. Aviv before this oral argument, I have only seen him once before

in my life. It was the same day and the only time I ever laid eyes on David Trott, and it was in the Kevelighan courtroom. I wasn't counsel in that case, but I was watching it.

And that's the case where Judge Duggan ruled, and we put this in the complaint, that you can't get more than 3,750 before the foreclosure under the Michigan foreclosure by advertisement statute.

So they are either not stating the correct amount or they are overstating the amount. We need discovery to figure that out. We certainly have that second claim.

I want to go back briefly to the attorney letterhead claim. We think that there are multiple indications sufficient in this -- in both letters to indicate -- and I want to just correct Ms. Olson, if it's actually a correction. She suggested that we were arguing in the alternative that these letters were not -- excuse me -- were from attorneys, but somebody might have mistakenly thought they were not from attorneys. That's not what we're arguing. That's what they are arguing.

They are arguing that they could not reasonably be interpreted to be from a lawyer, but they are. You, your Honor, required that they file an answer to the complaint the same date they filed their motions to dismiss. In both of those answers, and we've cited the paragraphs, they say they were from attorneys.

But in their argument in this motion they said, oh, they can't reasonably be interpreted to be from attorneys. That's an admission of liability. I mean, that's -- that's just flat-out right in with the Kistner case, if it can be interpreted two ways, one of which is wrong, it's -- it's misleading under the FDCPA.

But beyond that, we argue -- so we're pointing out their concession.

Beyond that, the indications for both, either the name David Trott and the firm Trott & Trott that's been the primary foreclosure firm forever, the font on the letterhead, the fact that it's Trott & Trott, which is a common -- the ampersand, two people from the same family, professional corporation, David Trott argues in his reply brief, well, a professional corporation could be a chiropractor, could be a dentist, could be an optometrist, could be a podiatrist.

You know, that's just a silly argument, Judge. I mean, nobody is going to interpret P.C. or professional corporation on what appears to be a lawyer letterhead to be a podiatrist. The use of the word client, firm, represent, foreclosure, and in the Martin letter it says, we're the creditor's law firm.

So these are just sort of extreme arguments. They are welcome to them, they can make them to you on summary judgment or in front of a jury, but they are ignoring the

proposition that you have to construe the pleadings in favor of the plaintiff, take the facts as true, and most importantly, the least sophisticated consumer standard. It's certainly reasonable to think that the least sophisticated consumer would think that these were from a lawyer.

We have talked about the attorney fee situation.

I want to talk about overshadowing, and I want to take a little more time on this, because I think --

THE COURT: You don't have a lot of time.

MR. McGUINNESS: I understand, your Honor.

They have made some really extreme arguments in this case. And I don't want to go over them, but I do think that the fact that they are making so many extreme arguments, just for example, that you have to construe the statute narrowly because it's trying to hold a party who wouldn't otherwise be held liable, that's just directly contrary to published Sixth Circuit law, and I have cited that in the response. It's the opposite of the FDCPA and the RCPA law.

But there is this argument that David Trott is making on the overshadowing claim, Ms. Olson does not make it for the firm, that it doesn't apply to the initial communication. And they make a textual argument based on the 2006 amendment which is currently in effect, it's just -- it's a suggestion, your Honor, first of all, just to start with the punch line, that you can overshadow like heck as long as you do it in the

initial communication. You can just fool people all you want. But it says within the 30-day period after you get the initial communication you can't overshadow, therefore, you can do it in the initial communication.

That's essentially the argument that David Trott is making both in his opening brief and in his reply brief. It's just a silly argument.

And, you know, the Ninth Circuit in Swanson, which is the lead overshadowing case in 1988, quote, "To be effective the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency."

That language is picked up by the Lamar case, the Sixth Circuit case that they like because it overruled or it found insufficient an overshadowing claim. And we haven't had another one -- well, we had a recent one, the Gillis case.

And then the Pollard case out of the First Circuit, which we cite in the footnote, post the 2006 amendment, has applied that overshadowing provision of 1692g, subpart (b), to initial communications.

It's just, you know, that they make these arguments, and then two courts, the Third Circuit and the Second Circuit, the Third in the Caprio case, 709 F.3d. 142, it's a 2013 case, have held -- and then the Solomon -- Ellis versus Solomon case out of the Second Circuit, 591 F.3d. 130, both have held that

when Congress put the overshadowing provision expressly in 1692g it was, it was doing so by codifying the common law of Swanson and the other cases.

But the big thing about these, this overshadowing claim, and I would like to -- you know, we put in this Federal Trade Commission advisory opinion dated March of 2008, and I want to just point out to the Court that these things are a big deal.

In the Jerman, Jerman case versus Carlisle, 559 U.S. 573, Supreme Court case in 2010, the Supreme Court, seven to two, reversed the Sixth Circuit that held that the bona fide error defense could apply to an error of law in the FDCPA. That's a case out of the Sixth Circuit.

And one of the things that the Court does is talk about the Sixth Circuit's interpretation that, well, there is a safe harbor in the FDCPA for FDC advisory committee opinions.

And so the Court in Jerman goes on -- and I don't want to read this to you and take up the time, but it's dealing with the issue that there is this mechanism. There was a lot of argument at oral argument about it. Justice Breyer was focused on it. These are big things. There aren't a lot of them.

In the one that we brought to the Court's attention, it's -- it's a foreclosure firm out of Cleveland asking the FDC for an advisory opinion so that they get a safe harbor,

can we put reinstatement -- requests for reinstatement, quotes, settlement options, in a foreclosure -- in the initial communication for a foreclosure letter.

And the -- and the FDC rules, it's not a per se violation, but then they go on, nevertheless, collectors must take care that communicating information about settlement options does not undermine the consumer protections in 15 U.S.C. 1692g(a). That's the validation rights.

They go on to say, it may not overshadow or be inconsistent with the disclosure. Debt collectors that provide consumers with information in addition to the mandatory disclosure violate 16 -- I'm sorry -- 15 U.S.C. 1692g(a) if the additional information effectively obscures the consumer's right to dispute his or her debt and obtain verification from the collector.

So what they have done here is, you have got the least sophisticated consumer getting the first foreclosure notice from a law firm, their biggest asset, their shelter, they are freaked out, it's a very scary and tough situation. And for this subset, this is a subclass, the SRRQ, solicitation of request for reinstatement quote, they are telling them, you have got this 30 days, but you may have the opportunity to reinstate your mortgage. You have to do it before the -- before the sale, before the sheriff's sale, however. So there is a sense of urgency there.

In her brief, in the Trott Law brief in response -- I'm sorry -- in their opening brief, here's a sentence I think is really important: Exhibit A, the Martin letter, does not affirmatively state nor reasonably imply that foreclosure proceedings have been commenced as of the date of the letter or that such proceedings have any effect whatsoever on the plaintiff's right to seek validation during the 30-day validation notice.

Judge, if that's true, all they had to do is to say that in the letter. She has now, in this sentence, indicated a really easy way to avoid any possibility of confusion. And she says, well, we don't -- you can't -- it's not right for you to require us to put corrective disclosures.

But in the Buchanan versus Northland Group case, Sixth Circuit 2015 reversing the dismissal of an FDCPA case out of a different judge in this court, that's exactly what Judge Sutton said. It would have been easy to fix this. And he offered different language. In fact, he took it out of a subsequent version of the letter at issue from the debt collector. He says, it's not that hard to do. But here --

THE COURT: All right, Mr. McGuinness. I think I understand your argument. Your time is up.

Would you like to spend some time on your motion to amend?

MR. McGUINNESS: I'm going to let Ms. Gjonaj argue

that, if that's okay.

MR. AVIV: Your Honor, would it be possible to make a short reply?

THE COURT: I'm going to hear the motion to amend and then I'll hear your replies.

MS. GJONAJ: Thank you, your Honor.

We are seeking leave to file a second amended complaint to add a claim under the federal and state debt collection statutes based on defendants' use of the term, corporate advances, in the debt collection letters that it sent to homeowners.

The claim here mirrors the corporate advance claim that was in the Wilson case where this Court sustained --

THE COURT: I'm familiar.

MS. GJONAJ: Okay. And the Court sustained the legal viability of the claim.

I'll try to keep this short.

But the plaintiff Martin and plaintiff Cadeau in this case both received letters from Trott Law that have the line item charged for corporate advances. And just as in the Wilson case, the term, corporate advance, doesn't appear anywhere in the mortgage note or -- or I'm sorry -- the mortgage for Martin or for Cadeau.

Now, defendants have pointed to this single use of the word, advanced, in the Martin mortgage and say that this

somehow changes the analysis from the Wilson case; however, the cases analyzed by this Court in Wilson, which found that the letters were misleading, did so where the term was used to mask an attempt to collect attorney's fees and found that the phrase didn't adequately disclose the nature of the debt.

Similarly, here, where you look at the Martin mortgage, it simply states the lender secures the payment of all other sums with interest advanced under paragraph 7 of the mortgage. That's that one reference to the word, advanced, in the Martin mortgage.

Now, when you look to paragraph 7 of the mortgage it makes no mention of attorney's fees whatsoever. So if a consumer were to receive this letter, then go back to their mortgage and try to make sense of it, a consumer would still be confused and would have no idea that it includes the attorney's fees.

Now, for the -- for plaintiff Cadeau's claim, defendants haven't pointed to a single reason why she should not be able to pursue a claim against Trott Law. The claim precisely tracks the Wilson ruling. And David Trott, however, takes issue with the date of the Cadeau letter and that it was sent in October after he had left the firm.

But to be clear, your Honor, the plaintiff is not individually seeking a corporate advance claim against David Trott; rather, she is seeking to represent a class.

To the extent that this argument is based on whether --

THE COURT: How can she possibly represent a class without having a personal stake in the claim herself?

MS. GJONAJ: Well, this is going to the Fallick issue, which actually Drew is prepared to address, as well.

THE COURT: You're arguing the motion, counsel.

MS. GJONAJ: Sure. So the Fallick issue that we go into in more detail in the Martin overshadowing claim, a plaintiff can seek to represent a class of individuals that are similarly harmed during the time that Trott was at the firm.

So while the Cadeau letter was sent after he may have left the firm, it's the same harm. So under Fallick this is something that would be considered at class certification and not at this point.

THE COURT: Yes, except right now you're asking to amend a complaint to add a plaintiff to file a claim against an individual against whom she has no valid claim. So why should I allow you to amend to add -- to permit her to sue that defendant?

MS. GJONAJ: Well, your Honor, because --

THE COURT: We're well before class certification. We're not dealing with class certification now. We're simply dealing with Rule 15, and futility certainly is a basis to

deny an amendment. And if you concede that she has no claim against David Trott individually, why should I let her join the lawsuit?

MS. GJONAJ: Well, your Honor, because she does have a claim against Trott Law.

THE COURT: Sure. But, so you're asking that she be allowed to join the lawsuit and sue that defendant only, is that what you're saying?

MS. GJONAJ: That she should -- well, that she should individually, and on behalf of the class, be able to sue Trott Law. And since it is a similar harm and we're talking about the same type of form letters that were sent before and after David Trott left the firm, that she could adequately represent a class of individuals that received the letter while Trott, David Trott, was still with the firm.

THE COURT: Okay. Thank you. Anything else?

MS. GJONAJ: If you would like, I can touch briefly on prejudice and undue delay.

THE COURT: No, I don't think you need to talk about that.

MS. GJONAJ: Okay.

THE COURT: All right. Anything else?

MS. GJONAJ: That is all, your Honor.

THE COURT: Thank you.

Mr. McGuinness, I neglected to ask you a question.

Do you concede that Mr. Martin's claims under federal law are barred by the statute of limitations?

MR. McGUINNESS: He doesn't have a claim in the complaint against -- under the FDCPA, he hasn't brought that claim. He has brought an RCPA claim and he is seeking -- Ms. Nundley has brought an FDCPA claim, but --

THE COURT: No, I understand that, but my question is: Do you concede that he has no claim under the federal statute?

MR. McGUINNESS: Absolutely, Judge. We have not -- we have not pled a claim on his behalf. We have not pled a claim against David Trott with the new Cadeau plaintiff in the second amended complaint under the FDCPA. But under Fallick, both of those individuals can represent a broader class.

And in fact, in the David Trott -- I'm sorry -- Martin, to establish his RCPA claim against both defendants on that same theory would be saying, you misrepresented the legal status of my -- of my debt in that initial communication when you violated federal law at the time you sent it. That states a claim under the RCPA. And there is a six-year statute, as Judge Cleland has held, under the RCPA.

So it's a predicate to his RCPA claim, therefore, he has got every incentive, as does she, to establish those claims against both defendants. And under Fallick that's what

the rule --

THE COURT: What jurisdiction do I have to entertain a state law claim by a non-diverse party?

MR. McGUINNESS: Under the CAFA, Judge. We're -- nobody has even argued that point. We put it in our brief. We laid it out. We have alleged about 250,000 class members. The claims are $200 a piece under the RCPA. That's well over the $5,000,000 threshold, it's well over the 100 putative class member threshold, and at least one of those --

THE COURT: But he has no federal claim and there is no diversity, not even minimal diversity.

MR. McGUINNESS: He has minimal diversity. You just need to have somebody in the class. And certainly of these people who --

THE COURT: But I haven't certified a class.

MR. McGUINNESS: No, but under CAFA, Judge, it's the pleading. And if you plead a class that -- obviously, people who have -- 200,000 people who have had their houses foreclosed upon, Judge, at least a few of those people have left the state. That's what we plead in the first amended complaint.

THE COURT: Okay. Thank you, Mr. McGuinness.

MR. McGUINNESS: And so we have minimal jurisdiction under --

THE COURT: Ms. Olson, do you have any rebuttal?

And please address the amendment motion, if you wish.

MS. OLSON: I will, your Honor. And I will be concise and brief.

Attorney letterhead claim, I don't believe that there has been any articulation as to how these letters are misleading. Essentially, the argument I hear is, if there is an attorney involved in the file, and plaintiffs concede the attorneys are involved in reviewing everything, because they have already attached the deposition transcript which establishes our point, that they have to sign it, they have to sign this letter, and they have to have this name on the letter, otherwise it's false and misleading under 1692e, or in the alternative, if the letter is sent and it's not signed by an attorney and doesn't have an attorney name, then we have to have a disclaimer of attorney involvement notwithstanding the fact that an attorney is involved. That's the type of bizarre and idiosyncratic read of a letter that the Sixth Circuit has, you know, dictated shouldn't survive a 12(b)(6).

And I understand that these are difficult issues, your Honor, but in this instance, neither of those lead to a situation where there is sufficient factual allegations to establish how that letter is misleading, given what we know about the process, given what plaintiff has conceded.

Second point I want to make, you asked plaintiffs' counsel pointedly, how is it misleading not to charge certain fees? Right? How is it misleading to put an amount that's

actually less than what you owe? And I didn't hear a response. I heard reference to the fact that plaintiffs have repeatedly alleged that such fees were owed.

Document 22, page ID 651, plaintiffs' counsel cites a number of paragraphs within the complaint. I have looked at them. Again, I don't see any factual allegations that these folks owed fees or not. Plaintiffs' counsel can surmise and guess that fees were owed, but I respectfully submit to the Court that that's not the standard. That's not how you move this claim in such a way for purposes of the 12(b)(6) standard.

Lastly, your Honor, the overshadowing claim, I stand by my previous arguments that we are not under any duty under Sixth Circuit precedent to include or interject reconciling language.

The quote at issue and the quote that plaintiffs take issue with, your Honor, is this: "Requests for reinstatement information must received and approved by this office before the date of the sheriff's sale." Okay?

There is nothing in the letter that says that the sheriff's sale has been commenced. There is nothing in the letter that says that a request for reinstatement will somehow preclude or foreclose, no pun intended, the recipient of this letter from otherwise exercising all of the rights that are available to them under 1692g.

And so the suggestion, again, that because we're

referencing that we have been retained, we're referencing that we have been retained for purposes of foreclosure, that that somehow creates confusion when juxtaposed against the 1692g language. Again, I just think that's a stretch, understanding that the threshold is low not only under 12(b)(6), but under the least sophisticated consumer standard.

And so, again, I think there is nothing in the letter, read as whole -- we can't just pull a sentence out, we can't pull a paragraph -- read as a whole, there is nothing in that that would discourage or confuse even the most least sophisticated consumer from understanding that if I want validation of the debt, I've got to do this within 30 days. If I want to request reinstatement, I have got to call the phone number. That's all it says. It doesn't say that doing one forecloses the other and I don't believe it reasonably implies that.

As it relates to the second amended complaint, Judge, truthfully, I mean, we have briefed all of these issues and then the corporate advance claims come in. This is a claim that I believe we addressed during our very first meeting with the Court. And the Court, I think, asked fairly pointedly, are you looking to include this claim? Is this case related? What's going on?

And I think that was done in part -- I certainly read it so that we would understand where this case was going, set

up a briefing schedule, and do the things we have done.

At the time that meeting was held, certainly at the time that complaint was filed, this claim was out there. It's in the letter. This isn't a circumstance that this is later discovered evidence or something that plaintiffs have in good faith come across and have decided to add.

They have made a strategic decision not to add this claim, and now, five, six months into the case when we have done all of the briefing on the motions to dismiss, in the eleventh hour, now that claim reappears. It's as if we're going to start this entire process over again as it relates to a potential second amended filing.

I don't understand the reasons why it wasn't included previously, but the point remains, anything in the second amended complaint that's been proposed that relates to this claim one, two and three, we stand on the arguments we have made for purposes of the dispositive briefing.

As it relates to the corporate advance theory, I didn't have the benefit of being part of the Wilson case from its inception. We certainly understand and respect the Court's ruling as it relates to the corporate advance claim.

THE COURT: Right. But if I grant the motion, then you'll have an opportunity to revisit it.

MS. OLSON: We certainly will have an opportunity to revisit it. I just didn't want the Court to think that we

weren't mindful and didn't take care to read your Honor's order as it relates to that particular claim. But the reality is, I think the window of opportunity for that claim was in front of plaintiffs on numerous occasions.

THE COURT: Well, is it the -- are you citing as prejudice the fact that you would have to engage in another round of Rule 12 motions if that amendment motion is granted?

MS. OLSON: There would be certain prejudice.

THE COURT: Is that the prejudice?

MS. OLSON: And I conceded in our response to the thing, I'm not suggesting that that creates some sort of prejudice that couldn't be remedied in terms of, you know, costs for the time we have spent briefing and those types of things. The Court could certainly fashion relief in a way that would be equitable to all concerned.

But again, as it relates to this particular claim, you know, I think we have -- I think we have briefed the claims. I think we are where we are and --

THE COURT: All right.

MS. OLSON: I'm just troubled that this is, you know, mid February, we're putting a claim in that has been out there from the beginning, and a claim that plaintiffs' counsel, you know, squaredly looked both you and everyone else in this room in the face and said, this isn't going to be part of this case.

THE COURT: Actually, I think it's March.

MS. OLSON: March, yes. Well, the claim came in February.

THE COURT: Right. Okay.

MS. OLSON: Thank you, your Honor. We do think -- we do think that the claim should be dismissed. Thank you.

THE COURT: Thank you.

Mr. Aviv.

MR. AVIV: Yes, your Honor. With your permission and accommodation, I would like to reply to Mr. McGuinness's argument.

THE COURT: Sure, no, that's what I'm asking you to do.

MR. AVIV: But Mr. Segal will respond to the motion to amend.

THE COURT: Oh, all right. Go ahead.

MR. AVIV: If that's okay.

And I'll be very brief. The snow is coming and there's a debate to listen to tonight, so.

THE COURT: Well, for some of us.

MR. AVIV: For some of us. It's entertaining.

THE COURT: For some of us.

MR. AVIV: Entertaining and alarming.

The only response I heard from Mr. McGuinness on my argument, on Mr. Trott's argument that there are -- that there is nothing alleged against him to make the complaint survive

is Rule 8. But we're way beyond Rule 8.

And the only quote that I will -- I will remind your Honor, I'm sure you remember, is that while paragraphs 151 and 152, the only paragraphs that allege anything against Mr. Trott, may be consistent with his liability, that doesn't do the trick.

And what the Supreme Court specifically held in Iqbal is, where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. And he has not alleged facts showing a plausibility of liability.

The second thing I want to respond to, you -- in response to your question about Martin's FDCPA claims, and he indicated that Martin has RCPA claims, and therefore, he should be allowed to remain in the lawsuit. I didn't get a chance to argue that.

He has no RCPA claims. And the reason he doesn't have RCPA claims is because he hasn't alleged facts showing that David Trott is a regulated person.

Now, excuse me for being a statutory textualist, but again, we need to look at the statute. And what the statute, the way it defines a regulated person is, a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection

agency.

And then it goes on, the statute, to define what a collection agency is. And a collection agency means, a person directly or indirectly -- here, by the way, your Honor, it's a person directly or indirectly, and in the FDCPA, it's not a person directly or indirectly.

Anyway, a collection agency, a person directly or indirectly engaged in collecting or attempting to collect a claim owed or due or asserted to be owed or due another arising out of an express or implied agreement. That's the definition of a collection agency.

Well, what they plead in their complaint, in paragraph 171, is that both Trott, P.C. and Congressman Trott are or have been regularly engaged, directly or indirectly, in the collection of debts, of mortgage debts.

So their complaint puts Trott squarely within the statutory definition of a collection agency. And if he is squarely within the definition of a collection agency, under their allegation, then the RCPA simply does not apply to him.

Now, let's -- let me make the other argument. Let's ignore that conclusory allegation. Let's ignore it. They still don't show that Trott is a regulated person, because the definition would be -- the issue is not, can an attorney be a regulated person. An attorney can be a regulated person. In fact --

THE COURT: In fact, the statute specifically says that.

MR. AVIV: Inclusive. Although it's a real badly, badly drafted statute, because that's an inclusion, but it can't be the business of a collection agency.

But let's forget that for a second being. An attorney can be a regulated person if, if the attorney is handling claims for -- on behalf of a client or in his own name. And there is no allegation that David Trott handled this claim or handled any claims in general. And if he isn't handling claims, I mean, there is not even an allegation that reviewed any account, if there is no allegation that he handled claims, he cannot be a regulated person, and therefore, the RCPA doesn't apply.

Last point, your Honor, very quickly. I just want to say something about Fallick, because they are using Fallick to allow Martin to remain and assert class claims against David Trott.

So what exactly happened in Fallick is that the Sixth Circuit first found that the plaintiff in that case could proceed -- he had -- what the plaintiff had was claims for breach of fiduciary duty and equitable relief under ERISA. And the Sixth Circuit found that plaintiff had stated those claims upon which relief can be granted. So the plaintiff had ERISA claims.

It also found that, that he purported to represent both his class, his plan, and other plans and the participants in the other plans had the very same ERISA claim that he had. And as a result, the Sixth Circuit said, whether he can proceed to represent a class that had his claims, but belonged to different plans is a Rule 23 issue, it's not a standing issue.

Here we don't have that. We don't have a plaintiff, because his claim is barred by the statute of limitations.

THE COURT: Well, the point Mr. McGuinness makes is that it doesn't matter because he is not seeking to advance any federal claims, he is invoking the federal jurisdiction under CAFA, making allegations that Mr. Martin has state law claims on behalf of a class that falls within the jurisdictional parameters of CAFA, and therefore, he can stay in the lawsuit there.

And oh, by the way, he should also be able to represent a class of people who have federal claims, as well, and that is a Rule 23 issue. And he might be right about that, but --

MR. AVIV: Well, I don't know any case -- I don't know any case that allows a plaintiff to be a class plaintiff when the plaintiff doesn't have his own federal claims. I don't understand, and I know of no case, where you could -- you can have no federal claim and yet assert a federal class action claim.

THE COURT: Sure. But that's not a Rule 12 issue. I think you're right. It's a Rule 23 issue.

MR. AVIV: His appropriateness --

THE COURT: He may not be an adequate class representative.

MR. AVIV: But what I'm suggesting is, he has to be dismissed from the -- actually, it's not whether he is dropped from the case. The issue is, is David Trott dismissed from the case. And if plaintiff doesn't have a claim against David Trott, he can't keep David Trott in the case by bringing a putative class action.

THE COURT: Well, yeah, but then there is Nundley, and that's -- the question is whether or not the merits of your motion succeeds as to her, I think.

MR. AVIV: Yes. Okay. Thank you, your Honor.

THE COURT: All right.

Mr. Segal, you have been very patient.

MR. SEGAL: I will be very brief, your Honor.

THE COURT: All right.

MR. SEGAL: But I will answer one question, which is, that there is quite a bit of authority that says that the plaintiff who doesn't have a claim against a defendant doesn't have standing, and that Rule 23 doesn't usurp the Constitution.

I would refer your Honor to the DaimlerChrysler Corp case. And these would have been in our brief, but they

were --

THE COURT: But that's beside the point.

MR. SEGAL: Well, not really, your Honor, because --

THE COURT: Yes, really. So let's move on to the amendment part.

MR. SEGAL: This is with regard to the amendment, your Honor.

THE COURT: Oh, because you're saying that it's --

MR. SEGAL: Mr. Martin has no claims.

THE COURT: Right. Against Mr. Trott.

MR. SEGAL: Yes.

THE COURT: Yeah, okay.

MR. SEGAL: Your Honor, there is the DaimlerChrysler Corp versus Cuno case. These arguments were raised in their reply brief; otherwise, they would have been in our initial response brief, your Honor. That's the only reason I brought them in now, because they were only raised in the reply.

But the DaimlerChrysler case is 547 U.S. 332. The Court said, "We see no reason to read the language of Gibbs so broadly, particularly since our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."

Then, your Honor, there is the Sixth Circuit case of Neighborhood Action Coalition versus City of Canton, Ohio; that's 882 F.2d. 1012, it's a Sixth Circuit case. The Court

said, "In Allen v. Wright," that's a U.S. Supreme Court case, 468 U.S. 737, "the Court held that standing to sue requires a showing of personal injury which is fairly traceable to the defendant's illegal conduct and which is likely to be addressed by judicial relief.

"Moreover, this Circuit requires that plaintiffs who represent a class allege and show that they personally have been injured, not that the injury has been suffered by other unidentified members of the class to which they belong and which they purport to represent."

Then in Liberty Capital Group LLC versus Capwill, your Honor, it's at 148 Fed. Appx. 413, the Sixth Circuit said, "A class plaintiff such as Lazar cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he has suffered no injury. This is true even though the plaintiff may have suffered an injury identical to that of the other parties he is representing."

So I think both the Supreme Court and the Sixth Circuit have adequately addressed the issue that they try to raise with regard to bringing claims on behalf of Mr. Martin when he himself has no claim, your Honor.

THE COURT: We're not talking about Mr. Martin, I don't think.

MR. SEGAL: Excuse me?

THE COURT: Oh, I see. You're saying Mr. Martin with respect to the amendment, because that would be --

MR. SEGAL: Correct. He has no --

THE COURT: What about, do you have any arguments with respect to the motion to amend other than that?

MR. SEGAL: Yes, your Honor.

Quite specifically, I have read the Wilson case. I have gone back, I have read the mortgage documents in the Wilson case. I have read the Martin documents. The Martin documents refer to his liability for the payment of advances. There was no mention of advance liability in the Wilson case.

And if you look at the two, you look at what's alleged, there is really no way that a person who, no matter how unsophisticated you are, if you read your mortgage and you see, I'm liable for advances, and you get a letter that says, here's a $100 -- $101.75 liability for a corporate advance, that you can't look at it and say, oh, yes, it ties exactly in with paragraph 2 of my mortgage.

It's not a misrepresentation. It's not something that either the RCPA or the FDCPA were meant to cover. And since -- other than that, since the new plaintiff does not allege any claims against Mr. Trott, for the same reasons that Mr. Martin is not entitled to add the corporate claims, she is not entitled to add any claims against him, your Honor.

THE COURT: All right. Thank you.

MR. SEGAL: Thank you.

THE COURT: Well, counsel, I think you have one last shot if you have any reply to the motion to amend.

No, Mr. McGuinness, not you.

MR. McGUINNESS: Okay.

THE COURT: Don't feel obliged.

MS. GJONAJ: Pardon?

THE COURT: I say, don't feel obliged.

MS. GJONAJ: Just a couple quick points.

THE COURT: You might want to address the reason why you didn't raise this earlier or include it in either the complaint or the first amended complaint.

MS. GJONAJ: Sure. Well, we did discuss this at the first status conference that we had and plaintiffs reasonably relied and absolutely knew of the Wilson case that was pending and relied on the prosecution of those claims in the Wilson case.

We further relied on the Supreme Court decision in American Pipe, which defendants haven't touched on at all, which says that the statute of limitations is tolled while a class action is pending. In American Pipe it specifically says this is to avoid duplicative filings of the same claim.

So here I don't see how they could argue undue delay when this motion to amend was filed only 18 days after Trott Law settled the Wilson case on a non-class basis.

And just to touch quickly on the prejudice that Trott Law mentioned, the Sixth Circuit, in Phelps v McClellan, that's 30 F.3d. 658, states that the -- in that case the Court found that the fact alone that the party would need to defend against a new claim is not enough to establish prejudice. In that case they allowed an amendment where the delay was only two months -- was two months after the event.

I think that's all I have, your Honor.

THE COURT: All right. Thank you.

MS. GJONAJ: Thank you.

THE COURT: The motions are submitted. I'll get you a written decision in due course.

Anything further for the record from the plaintiffs?

MR. McGUINNESS: No, your Honor. Thank you.

THE COURT: Thank you. Defendants?

MR. AVIV: Thank you, your Honor.

MS. OLSON: Thank you, your Honor.

MR. SEGAL: Thank you, your Honor.

THE COURT: All right. Good luck getting out of town this afternoon.

You may recess court.

THE CLERK: All rise. Court is now in recess.

(Proceedings adjourned at 4:13 p.m.)

* * *

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Rene L. Twedt — January 16, 2018
RENE L. TWEDT, CSR-2907, CRR, RMR, RDR — Date
Federal Official Court Reporter